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Rules, Institutions, Transformations
Considerations on the "Evolution of Law" Paradigm

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Rules, Institutions, Transformations. Considerations on the "Evolution of Law" Paradigm*

by

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1. Concepts of Law. A Proposal

In recent years there has been a rebirth of evolutionary conceptions of law, as regards both the ontology of law and the explanatory methodology of contemporary legal phenomena. One may accordingly speak of of a paradigm of "evolution of law", using the term "paradigm" in Thomas Kuhn's sense. I wish below briefly (perhaps too briefly) to discuss this paradigm. My considerations are divided into six sections.

First, I feel it needful to offer a definition - albeit approximate - of the concept of law. In my opinion, the law cannot be reduced to a series of mandates or imperatives, nor to a mere system of norms, nor to regularities of conduct, nor to functions of a reality of a natural, objective type, that is, to a set of "crude facts". The first position is the one defended

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* These notes reproduce, with changes and additions, the texts of two lectures given at the Universities of Valencia and La Laguna (Tenerife) in December 1991 and May 1992 respectively, and of some seminars given at the European University Institute in 1992 and 1993.

by the voluntarist or imperativist theoreticians, such as for instance Jeremy Bentham and John Austin, though they too introduce elements that in one way or another limit their voluntarism and imperativism (I am thinking, for instance, of Austin's idea of legal rules as abstract mandates, that is, as acts that lay down classes of conduct rather than specific conduct).

The second position belongs to the so-called normativists, whose most typical representative is Hans Kelsen, while the third position is that of legal realism, particularly in its American version. The last position is that of legal sociology, or rather of many sociological theories that study law as a phenomenon of social reality, seen as a framework of natural, empirical reality.

I wish to bring out some of the reasons why I am not in agreement with any of the theories mentioned.

Law is not a sum of mandates or imperatives. A mandate or imperative acts interpersonally and its validity depends on the (phycical and/or psychological) power of the subject issuing it. Law and legal norms are, however, eminently impersonal phenomena. Legal norms continue to be valid even when the subjects that issued them are dead. Sometimes they are even valid and in force though the subjects that are their addressees are unaware of their existence, that is, do not know that anyone has issued those norms.

Like Jürgen Habermas, I am not convinced of this central thesis of so-called "prescriptivism", namely that "in the logical structuring of discourse, imperatives must take primacy over rules of conduct[1]. "The meaning of the universal validity claim,"

[1] J. HABERMAS, Zwei Bemerkungen zum praktischen Diskurs. Paul Lorenzen zum 60. Geburtstag, in idem, Zur Rekonstruktion des Historischen Materialismus, Suhrkamp, Frankfurt am Main 1982, p. 344.

claim," continues the Frankfurt philosopher, "the claim to normative validity, associated with norms of action can adequately be analysed only in terms of intersubjective recognition and not in terms of generalized commands"[2]. "An order or request," writes Carlos Nino, "are acts of formulating normative judgements with the intention that this formulation be relevant for the reasons the addressee already has"[3]. In order for an order, a mandate, a prescription, an imperative, to be effective, the addressee must have reasons preceding formulation of the order, which can accordingly not be founded on the order itself. The fact that I am an addressee of a prescription cannot, on pain of falling into the naturalist fallacy, justify my decision to obey the prescription itself. In order for it to have normative validity, and be able to guide my action, one must assume a normative principle stating that a certain normative formulation, in certain frameworks and contexts, and issued by certain persons, has the value of a rule of conduct.

Furthermore, imperativism has to assume a semantic theory that is very questionable. In the first place, for prescriptivism rules have a meaning, a semantic content, only to the extent that they have been the object of an action of promulgation, of will, of the prescriptive use of language. This is the so-called "expressive" conception of norms[4]. In the second place, imperativism must assume an "intentionalist" theory of language, according to which the meaning of a statement (and a fortiori of a rule) is the "intention" of the person issuing it[5]. Thus, in

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[2] Ibid.

[3] C.S. NINO, El constructivismo ético, Centro de estudios constitucionales, Madrid 1989, p. 54.

[4] See C. ALCHOURRON, E. BULYGIN, The Expressive Conception of Norms, in New Essays in Deontic Logic, ed. by R. Hilpinen, Reidel, Dordrecht 1981, pp. 95 ff.

[5] For H.P. Grice, one of the defenders of the intentionalist theory, a linguistic expression *x* means *p*, if (i) there is an intention by the utterer of *x* that *x* should mean *p*, (ii) there exists the recognition or the possibility of recognition by the addressee of *x* that behind *x* there is the intention to mean *p* and

order to understand and interpret the norm-mandate, one must identify a human subject that is its issuer. These two theses of the theory of meaning may be objected to prima facie on the ground that "expressivism" is an obstacle to a logical and rational reconstruction of the legal decision[6] and that "intentionalism" is an obstacle to any process of interpreting the rule (the law) that does not have as its direct aim the assertion of the subjective, historical will of the subject that laid down the rule (the legislator)[7] Despite what Carlos Alchourrón and Eugenio Bulygin aver[8], "expressivism" has many

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(iii) there is the intention by the utterer of x that p be recognized as its meaning (see H.P. GRICE, Meaning, in "Philosophical Review", 1957, pp. 377-388).

[6] For a critique of the "expressive conception" of rules, see O. WEINBERGER, Der normenlogische Skeptizismus, in "Rechtstheorie", 1986, pp. 45 ff.

[7] This difficulty is seen by Grice, who however believes that in some way any meaning can refer to a particular intention. Thus, after having distinguished between "natural meaning" (meaning N) - more or less close to what is understood in linguistics by the "sign", where the fact that x means p implies p - and the "non-natural meaning" (meaning NN) - more or less close to what "in linguistics would be called "symbol", where the fact that x means p does not imply p, the English philosopher defines the concept of "non natural-meaning" (meaning NN) as follows: "'X meant something' is (roughly) equivalent to 'somebody meantNN something by x'. Here again there will be cases where this will not quite work. I feel inclined to say that (as regards traffic lights) the change to red meantNN that the traffic was to stop; but it would be very unnatural to say, 'somebody (e.g., the Corporation) meantNN by the redlight change that the traffic was to stop'. Nevertheless, there seems to be some wsort of reference to somebody's intentions" (H.P. GRICE, op.cit., p. 385, my emphasis).

[8] "The [expressive] theory is easily adaptable to customary norms. Its existence depends on certain provisions revealed in particular actions" (C. ALCHOURRON, E. BULYGIN, La concepción expresiva de las normas, in idem, Análisis lógico y derecho, Centro de estudios constitucionales, Madrid 1991, p. 127). But if it is affirmed that "norms are the result of the prescriptive use of language" (ibid., p. 123, emphasis in original), it will be necessary to conclude that customary norms, which are not the result of any use of language (and a fortiori any prescriptive use of language), are not "true" norms. The "provisions revealed in particular actions" are not speech acts, still less

problems with explaining implicit rules, which even in the legal experience of the modern State play a fundamental part (for instance, as regards customary norms, case law and the general principles of law, all of them based on sets of rules not explicitly laid down). Ultimately, what imperativism forgets is, as Waismann says, that "a command necessarily presupposes a commander, a rule does not"[9].

The law is not a mere system of rules, insofar as the norms are regarded as ideal entities, semantic contents, which as such do not need the fact of being observed. Each of us may mentally enunciate or make a list or a draft of a complete system of norms, a new penal code for example, without these norms being able to direct human conduct nor to constitute a truly legal phenomenon. Considering the difference between draft laws and actual laws. It may thus be stated with a fair degree of certainty that a norm manages to be a real (social) phenomenon instead of remaining just a semantic entity (however elaborate and theoretically interesting) once the conduct of the subjects to whom the norm is addressed or are in some way affected by it starts to conform with the norm. As Wittgenstein writes, "the arrow strikes only when used by the living being"[10]. This does not mean that the laws do not present themselves as systems of semantic entities. All it means is that the laws are also semantic entities, but in order to be socially existing norms, they need to be applied, that is, there has to be conduct corresponding to them or - if as Uberto Scarpelli suggested to us we take up Richard Mervin Hare's ideas - to their "phrastic", their semantic element that represents a certain state of affairs. What is being rejected here is only a more or less

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prescriptions or orders.

[9] F. WAISMANN, Logik, Sprache, Philosophie, ed. by G.P. Baker and B. McGuinness, Reclam, Stuttgart 1976, p. 209.

[10] L. WITTGENSTEIN, Philosophische Untersuchungen, Suhrkamp, Frankfurt am Main 1984, p. 208 (I, 454), cf. A. KEMMERLING, Regel und Geltung im Lichte der Analyse Wittgensteins, in "Rechtstheorie", 1975, pp. 109-110.

idealist or "platonist" normativism. This rejection does not imply that a position, that I regard as plausible enough, that has been called "realist normativism" cannot be taken up. It emphasizes interdependence among norms as semantic entities (or ideal ones if you like) and conduct, in the constitution of legal phenomena.

Nor does the law consist of regularities of conduct, since the fact that a piece of behaviour is constantly repeated over time neither indicates nor is the cause of that conduct's having to continue being repeated. The fact that I get up every day at seven in the morning does not prove the existence of a rule that I am obliged to get up every morning at such a barbarous hour. "The fact that a rule is followed" writes Waismann, "is something one can convince oneself of only by actually observing the movements involved. The validity of the rule is independent of such observations"[11]. Moreover, rules, by contrast with regularities, also deal with new cases, so that an agent following a rule may have an indication "what to do" even in situations that have never happened before[12].

Human conduct, people's actions, are not guided by a mechanical type of causality. Human conduct is motivated by intentions, and can be justified by reasons. Accordingly, in law, and in general in any normative phenomenon, the internal viewpoint, the viewopoint of the agent taking certain norms as bases for actions, prevails over the external viewpoint, that is, the viewpoint of someone merely considering the cause of certain behaviour and its possible conformity with certain rules or norms. Were the internal viewpoint not considered, Saul Kripke might be right in his sceptical interpretation of Wittgenstein's thought to the effect that any rule might be in accordance with any conduct, and accordingly it would not even be logically

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[11] F. WAISMANN, Logik, Sprache, Philosophie, cit., p. 211.

[12] See ibid., p. 209; cf. J.R. SEARLE, Speech Acts, An Essay in the Philosophy of Language, Cambridge University Press, Cambridge 1969, p. 42.

possible to speak of breach of a rule. In fact, without considering the internal viewpoint, much conduct might correspond negatively (as a breach) or positively (as compliance) with a particular set of rules or norms.

As Carlos Nino tells us, "if the legal norm is a reason to act, it cannot be an act or a fact without there having to be a judgement or a principle"[13]. If we accept the idea that norms are reasons for adopting particular conduct, and distinguish among causes, motives and reasons[14], we have to conceive of norms as semantic contents, as normative propositions that may take on the rule of major premises in practical reasoning. The imperativist conceptions (according to which norms are acts of will) and the realist theories (according to which norms are facts, without further qualification) deny the ideal, semantic or propositional, element in legal norms. These can accordingly constitute only causes or grounds for conduct, but never reasons to act in a particular way or manner. From an imperativist or realist viewpoint, there is not much point in talking of practical reason.

The internal aspect of judgements, desires, beliefs, norms, that is, their propositional or semantic content, is logically prior to their internal aspect, that is, their causal relevance, their capacity to be causes of other facts in the world, insofar as

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[13] C.S. NINO, El constructivismo ético, cit., p. 30.

[14] For this distinction, cf. F. WAISMANN, Language Strata, in Logic and Language, (Second Series), ed. by A. Flew, Blackwell, Oxford 1973, pp. 30-31. And see L. WITTGENSTEIN, The Blue Book, in idem, The Blue and Brown Books, Blackwell, London 1989, p. 15: "The proposition that your action has such and such a cause, is a hypothesis. The hypothesis is well-founded if one has had a number of experiences which, roughly speaking, agree in showing that your action is the regular sequel of certain conditions which we then call causes of the action. In order to know the reason which you had for making a certain statement, for acting in a particular way, etc., no number of agreeing experiences is necessary, and the statement of your reason is not a hypothesis". See also L. WITTGENSTEIN, The Brown Book, in idem, The Blue and Brown Books, cit., p. 88.

"the internal aspect of desires and beliefs is relevant - even for the observer interested in their causal relationships - primarily in order to identify them"[15]. "Desires and beliefs," continues Nino, "cannot be identified by their special outlines or location in time, but because they are desires and beliefs (that this or that person had in this or that circumstance) that something be the case or that something is the case. Without referring to the propositional content of desires and beliefs, we could not in any way identify them for the purposes of establishing causal relationships among them"[16]. Moreover, the fact that judgements, desires, beliefs and norms are identified on the basis of their propositional content has relevant repercussions on the way such judgements, desires, etc. act within causal chains, that is, on the way in which they may be taken as causes of other occurrences, especially of other judgements, desires, etc. As Carlos Nino says, "the desires and beliefs are only generated from other appropriate desires and beliefs, and which are appropriate depends on their internal aspect [....] Even where the generation of new desires from other ones and from beliefs is a causal phenomenon, this causal phenomenon has to do with propositions that constitute the internal aspect of the desires and beliefs and with the logical relations among such propositions"[17]. Put another way, judgements, desires, norms etc. can act as causes to the extent that their propositional or semantic content is heard or understood (that is to say, identified). This understanding is a necessary (even if not sufficient) condition for the causal relevance of the aforesaid judgements, desires, etc., and accordingly the relationship between judgements, desires etc. and actions in conformity with them cannot be explained in merely causal terms.

The intentions and motives of human conduct are in turn

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[15] C.S. NINO, El constructivismo ético, cit. p. 47.

[16] Ibid.

[17] Ibid.

"filtered" by norms, or are located within a framework of actions that have been made possible thanks to norms. One example of human conduct determined (made possible) by certain norms is going to church to hear mass. There are no masses nor churches without norms. An example of conduct "filtered" by rules is eating. People eat to satisfy an animal, physiological need, and eating does not presuppose any norm in order to exist as merely animal behaviour. Yet there is no behaviour more influenced by cultural factors than human eating. There are rules of how to eat, how to behave at table, for instance how to raise a spoon to one's mouth, and there are rules on how to cook and prepare a meal, and on what is to be cooked.

Ultimately, the law cannot be portrayed as a natural, objective reality, or as a function of this type of reality. The reason is that the existence of law coincides with compliance with its norms, so that it depends to a certain (very large) extent on these norms and their content. That is to say, the norms in the case of law, at least its basic norms, are constitutive of the reality of the law itself, in the sense that they determine its characteristics. Moreover, the law, like society, is an eminently cultural, not natural, phenomenon. It acquires "objectivity" to fairly limited extents, and only within a specific normative framework, or in other words only in respect to a given society and a specific historical time. Here it should be stressed that, if one accepts that the law is constituted by norms, that is, that it is a reality that cannot be conceived of without the norms themselves, it cannot be concluded that the law is a mere component of empirical reality, since the latter can be thought of without assuming any normative reference, or rather, without any imputation or attribution of meaning.

The internal viewpoint, the viewpoint of someone regarding rules as possible reasons to act in a given way, is indispensable for the existence of social rules. As H.L.A. Hart put it, stating his concept of legal obligation: "what is needed in order to establish rules that impose obligations, even in a simple system

of rules of customary type, is not simply for the rules to be supported de facto by social pressure and a general requirement for conformity, but that there must be majority consensus that these rules are legitimate responses to deviations, in the sense that they are required or at least permitted by the system. In this way, the pressure and the requirements will not be mere foreseeable consequences of the deviations, but normative consequences, since they are legitimate in this sense"[18]. However, it is just this "internal viewpoint" that functionalist theories (such as Luhmann's) cannot explain nor take into account. They perceive the phenomenon of law from an external viewpoint, from the viewpoint of the "unconstrained observer". The internal viewpoint cannot be taken seriously by those "realist" theories that in the best of cases reduce it to a psychological "fact" and to a merely subjective state (though sometimes referring in order to explain the intersubjectivity of social phenomena to the idea of social conditioning, an idea that still remains rather mysterious).

The object of the concept of law proposed here is as follows: law is an institution. By institution I propose to mean any system of norms or rules that are possibility conditions (for thinking a priori, and for perception a posteriori) for a framework of human conduct, for the case that this conduct is actually performed. Put otherwise, an institution is that framework for actions that is made possible by norms where the possibilities for actions opened by the norms are de facto taken up by human subjects.

In order to arrive at an institutionalist conception of law like the one adopted here, one must get rid of one old prejudice cherished by many generations of philosophers and jurists: that rules or norms serve only to restrict, or coerce, or limit people's possibilities of action. I would call this the "prescriptivist prejudice". In fact norms and rules may also

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[18] J.R. DE PARAMO, Entrevista a H.L.A. Hart, in "Doxa", 1988, p. 344; emphasis in original.

increase rather than reduce the possibilities and alternatives of action. This has been adequately pointed out by, among others, Newton Garver. "It might initially seem", - he writes, "that rules are essentially and unqualifiedly restrictive, since they determine what cannot or what must be done or said. Consideration of the role of rules in games and languages shows that this supposition is quite wrong. All the rules discussed so far have the effect of opening up new realms of activity, by defining the acts and practices in question, rather than that of restraining men from something they can already do. One cannot play bridge at all, one cannot even renege, except by reference to the rules which define the game; mathematical logic must remain entirely alien to one who won't learn the rules for it; and there are a whole host of common human activities such as gossiping, telling jokes, giving orders, asking questions, lying, making promises, and so forth [...] that one can engage in only after mastering a language"[19].

If we accept the definition of institution I have just sketched out, not only would law but also other systems of rules (etiquette, positive ethics, positive religion, certain types of games) would be "institutions" insofar as all these various systems of rules are actually observed, giving rise to conduct that would not have taken place without those rules. Here there accordingly arises the problem of distinguishing the law from other normative systems. One solution might be to refer to the interests unterlying the norms. This is the path taken by H.L.A. Hart in The Concept of Law. Law would then be the institution composed of that conduct aimed at the satisfaction of the most relevant interests of a given social group. I must however confess that this solution seems to me thoroughly questionable and highly problematic. This difficulty confirms one's criticism of the idea that constitutive rules can definitively exhaust the institutions (or practices) resulting from the observance of those rules. "The rules (the constitutive rules)", writes Hubert

[19] N. GARVER, Rules, in The Encyclopedia of Philosophy, ed. by P. Edward, vol. 7, MacMillan, New York 1967, p. 232.

Schwyzer, "do not themselves specify the way behaviour carried out in accordance with them is to be regarded; this is something that the laying down of the rules has itself to assume"[20]. That is to say, the meaning - and accordingly also criteria of identification - of the practice or institution do not lie solely in the rules that "constitute them".

2. Evolutionary Concepts

According to some sociological theories, one can speak of an evolution of society that obeys dynamics like those that seem to govern the evolution of biological phenomena. This is the conception of social Darwinism and of many Marxist theories (recall Engels's praise of Marx as the Darwin of the social sciences). It is also, with differing emphases and patterns, the conception of sociologists in the functionalist tradition, from Durkheim to Parsons and Luhmann.

As we know, for Herbert Spencer evolution was defined as the passage from a homogeneous undifferentiated state to a heterogeneous differentiated state: "Evolution is an integration of matter and concomitant dissipation of motion, during which the matter passes from an indefinite, incoherent homogeneity to a definite, coherent heterogeneity"[21]. This process of differentiation would accordingly mark social groups too, since social evolution is seen "as at once an increase in the number of individuals integrated into a corporate body, an increase in the masks and vanities of the parts into which this corporate body divides, as well as at the actions called their functions, and an increase in the degree of combination among these masks

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[20] H. SCHWYZER, Rules and Practices, in "Philosophical Review", 1969, p. 467.

[21] H. SPENCER, First Principles, Reprint of 1904 Edition, in The Works of Herbert Spencer, vol. 1, Otto Zeller, Osnabrück 1966, p. 321.

and their functions"[22]. Here evolution undoubtedly means progress. According to the British philosopher, as far as the human being is concerned "there is a gradual advance towards harmony between the mental nature of man and his conditions of existence"[23].

In the functionalist tradition, which in a way takes up Spencerian positions, the concept of evolution is strictly bound up with the notions of "diversification" and "complexity". As we know, for Durkheim the law of social evolution is what pushes a social state formed of homogeneous, similar segments towards a social state structured into distinct organs, each charged with a specific task[24]. This law of differentiation is valid for the evolution of living beings too. "La même loi préside," he writes, "au développement biologique"[25].

According to Radcliffe-Brown, one of the classic functionalist theorists, the theory of organic and supraorganic (social) evolution can be reduced to two fundamental theses: (i) first, there is a process of diversification in the development of both the forms of organic life and those of social life, thanks to which a plurality of different types of organic and social life have developed on the basis of a smaller number of original types; (ii) second, there is a general trend to develop more complex structures and organizations (both organic and social), which originate from much simpler structures and organizations[26].

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[22] Ibid., p. 416.

[23] Ibid., p. 414.

[24] See E. DURKHEIM, De la division du travail social, 6th ed., Felix Alcan, Paris 1932, p. 157.

[25] Ibid., p. 167.

[26] See A.R. RADCLIFFE-BROWN, Structure and Function in Primitive Society. Essays and Addresses, 4th ed., Cohen and West, London 1961, p. 8.

Talcott Parsons's sociological theory does not, I feel, present any great changes or novelties in relation to this "paradigm". Social evolution is regarded as an aspect in the broader history of organic life. The evolutionist sociological perspective that he adopts "conceives of man as integral to the organic world, and human society and culture as properly analyzed in the general framework appropriate to the life process". "Whether the adjective 'biological' be used or not, the principle of evolution is firmly established as applying to the world of living things. Here the social aspect of human life must be included"[27].

Again according to Parsons, social evolution advances thanks to the two mechanisms of variation (complexity) and diversification (response to complexity). "Socio-cultural evolution", he writes, "like organic evolution has proceeded by variation and differentiation from simple to progressively more complex forms"[28].

However, in all these theories it remains rather unclear by what criteria we can test the "complexity" and "diversification" of a social structure. That is, it is unclear in what connection one speaks in this context (supraorganic evolution) of "complexity" and "diversification". What I wish to stress is the fact that concepts like "complexity" and "diversification" are always relative to certain criteria, and accordingly change with changes in the criteria themselves.

Is today's Italian society where people speak more or less the same language more diversified, or was it more diversified a century ago when people spoke a variety of different dialects and did not understand each other? Is today's European society where people dress more or less the same more diversified, or was it more diversified two centuries ago when customs and clothes

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[27] T. PARSONS, Societies. Evolutionary and Comparative Perspectives, Prentice-Hall, Englewood Cliffs, N.J., 1966, p. 2.

[28] Ibid.

varied with region, class or social status, and according to, let us say, civil status (for instance, married women with different coloured skirts from spinsters)? If we took as the criterion of "diversification" the variety of clothes or languages, we should have to conclude that what has taken place in Italy and Europe in the last couple of centuries is not "evolution", but "involution", since the variety of clothes and languages has not increased, but considerably diminished. That is to say that we have, as far as ways of speaking and dressing are concerned, seen a process of simplification, or homogenization, not diversification.

The concepts of "complexity" and "diversification" refer to criteria that are relative, largely dependent on the topic being analysed and the observer's viewpoint. These concepts can be used as heuristic instruments, but cannot claim to represent any sort of ontological principle[29].

It should further be noted that the concept of evolution is not merely descriptive, but full of value implications. On the ladder of evolution, what climbs to the next (higher) rung is also "better" than what has stayed at the previous (lower) rung. Behind the concept of evolution it is thus possible to discern the profile of one of the greatest myths of industrial civilization: progress, with its prejudice of European ethnocentrism. Very significantly, Talcott Parsons, for instance, considers the market economy and democracy as necessary outcomes of social evolution, adding that these institutions are not simply peculiar inventions of certain societies, but

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[29] It is perhaps not otiose to mention here that the criterion adopted by some biologists to test evolution was the so-called "Willinston's law", according to which "the parts of an organism tend to reduce in number and specialize in function" (N. ABBAGNANO, Dizionario di filosofia, U.T.E.T., Turin 1969, p. 365). That is, according to this "law" the criterion of evolution is not an organism's greater complexity, but its simplification.

"evolutionary universals"[30].

That the idea of evolution, even in its most recent formulations, contains a semantic nucleus that contains the concept of progress is demonstrated by some arguments of Klaus Eder, more explicit in his progressivist faith and more direct and clear in his languange than the often cryptic Habermas. Firstly, Eder shows us where the difference lies between traditional (Hegelian) historicism and "communicative" (Habermasian) historicism. According to the former, history is the actual realization of reason, while for the latter history represents only the possibility of this realization. "History was no longer interpreted as the actual realization of reason, but as the possibility of the realization of reason"[31].

Eder assumes (i) that the structures of moral conceptions can be hierarchicalized so as to form a sequence of stages that appear as "evolution", and (ii) that this evolution is the product of collective learning processes directed towards the construction, at different times, of a social order. But when it comes to summarizing his two basic assumptions, Eder puts it this way: "My two initial assumptions are accordingly that there is something like moral progress in history; and that this moral progress is bound up with collective core processes in history"[32]. That is to say, the assumption that there is a hierarchy of stages of moral conceptions interpretable as an evolution in those conceptions is nothing more than the assertion of moral progress in history. Evolution here fairly explicitly means "progress". As pointed out to us by Helmut Plessner, evolution represents a form of industrialist ideology. "Every form of evolutionary

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[30] See T. PARSONS, Evolutionary Universals in Society, in idem, On Institutions and Social Evolution, ed. by L.H. Mayhew, The University of Chicago Press, Chicago and London 1985.

[31] K. EDER, Kollektive Lernprozesse und Geschichte. Zur Evolution moralischer Grundlagen politischer Herrschaft, in "Saeculum XXXIII", 1982, p. 116.

[32] Ibid. My emphasis.

universal history exalts man of the industrial epoch ..... In it, man of Euro-American culture is at the culminating point of time, with behind him states of being now surpassed, and before him an infinitely open future of continuing possibilities of growth"[33].

On the other hand, for the evolutionary theories evolution is like a process that develops in a necessary fashion, that has to develop just as it actually does. For instance, when Niklas Luhmann talks of the autonomy of social sub-systems, particularly the sub-system that the law is for him, he sees this autonomy as the outcome of social evolution, affirming that "this autonomy is not a desired aims but a fateful necessity"[34]. Thus, the concept of evolution is closely bound up with the idea of scientific law, particularly in its ontological version that assumes the existence of natural laws in relation to which scientific laws expressed in linguistic formulations are merely a reflection.

However, if society is a cultural phenomenon, and if cultural phenomena differ from natural ones by the fact of being constituted through rules, it proves fairly problematic to apply to societies and social groups a concept of evolution understood as a causally and objectively determined movement. In fact rules (at least those that constitute "institutions") bring "something" new into the world. The rules of cricket, if observed, "constitute" what turns out to be a "new" reality: the game of cricket. In the same way the rules of Esperanto, if applied, bring a new way of speaking and, to a certain extent, of thinking. Establishing a rule of this sort is a creative act, the invention of a new pattern of conduct, that is, a new form of life, which cannot be explained with respect to the de facto

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[33] H. PLESSNER, Die verspätete Nation. Über die politische Verführbarkeit bürgerlichen Geistes, Suhrkamp, Frankfurt am Main 1988, p. 112.

[34] N. LUHMANN, The Self-Reproduction of Law and Its Limits, in Dilemmas of Law in the Welfare State, ed. by G. Teubner, W. de Gruyter, Berlin 1986, p. 112.

situation preceding it, and accordingly cannot have the classical concept of "evolution" applied to it.

Human society is made up of acts and objects that have symbolic meaning. This meaning does not derive from any causal necessity but is a question of convention, creation, invention, and - if I may say so - of free will. Here we come to the split between nature and society: the former is governed by causes, the second by rules, since the symbols that make up society (which can be reduced to the form "x counts as y") are types of constitutive rules (in Searle's sense). But if this is the case, if social phenomena are governed by rules, by imputations or normative ascriptions, they cannot have applied to them a concept like "evolution", which is rooted in determinist assumptions.

An evolutionary theory is also sketched out by Friedrich Hayek. According to him, the system of rules of conduct present in the social order is the outcome of an evolution that has selected the system of rules that best ensures the group's efficiency and survival in the phase of challenges from the environment. "The properties of the individuals," he writes, "which are significant for the existence and preservation of the group, and through this also for the existence and preservation of the individuals themselves, have been shaped by the selection of those from the individuals living in groups which at each stage of the evolution of the group tended to act according to such rules as made the group more efficient"[35].

At least two criticisms may be directed against this evolutionary

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[35] F.H. HAYEK, Notes on the Evolution of Systems of Rules of Conduct, in idem, Studies in Philosophy, Politics and Economics, Routledge & Kegan Paul, London 1967, p. 72. It might be interesting to recall that Hayek also defends an evolutionary theory of ethics, though making it something not the object of human disposal or rational design. Ethics is thus seen only as positive ethics, a structure "given" to man, met with, so to speak, and not created by him. See F.A. HAYEK, Le regole della morale non sono le conclusioni della nostra ragione, in Libertà, giustizia e persona nella società tecnologica, ed. by S. Ricossa and E. di Robilant, Giuffré, Milan 1985, pp. 3 ff.

conception. First, in Hayek's thought we meet with the assertion, not further justified, of the homology between human social systems and living systems (animals and even plants). Hayek himself recognizes that the theory of social evolution has an intimate connection with the theory of the evolution of organic entities. "The theory of evolution of traditions and habits which made the formation of spontaneous orders possible stands therefore in a close relation to the theory of evolution of the particular kinds of spontaneous orders which we call organisms, and has in fact provided the essential concepts on which the latter was built"[36]. It should be stressed that behind this evolutionism there emerges a sort of descriptivist fallacy, that is, one of reducing the "normative" to the "descriptive", of rules to descriptions of states of affairs. In fact, for Hayek rules of conduct chiefly denote regularities, and have no prescriptive character. "The term 'rule'", he writes, "is used for a statement by which a regularity of the conduct of individuals can be described"[37]. "Norms are accordingly," asserts the Austrian economist, "an adaptation to the de facto regularity we depend on, but know only partially, and can cope with only if we comply with those rules"[38].

However, Hayek does see the differences between descriptive laws and normative laws, though he also believes the two to be closely connected. "The factual belief that such and such is the only way in which a certain result can be brought about, and the normative belief that this is the only way in which it ought to be pursued are thus closely associated"[39]. Thus, Hayek interprets the sense of guilt in the event of breaking a rule as the product of the

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[36] F.A. HAYEK, The Results of Human Action but not of Human Design, in idem, Studies in Philosophy, Politics and Economics, cit., p. 101.

[37] F.H. HAYEK, Notes on the Evolution of Systems of Rules and Conduct, cit., P. 67.

[38] Ibid., p. 80.

[39] Ibid.

fear produced in us by abandoning a known path, a regularity, and entering an unknown world. Breaking the rule in this sense means leaving the foreseeable for the unforeseeable[40]. According to Hayek, normative rules are informative in nature: they offer us information about the environment in which our actions have to unfold. Hayek's conclusion is familiar: "At least so long as the normative rules consist of prohibitions, as most of them probably did before they were interpreted as commands of another will, the 'thou shalt not' kind of rule may after all not be so very different from the rule giving information about what is"[41]. Thus, the semantic and methodological distinction between "theoretical information" and "practical information" is dissolved[42].

Second, the efficiency towards which systems of rules that survive are alleged to tend is a vacuous concept. Efficiency is in relation to certain goals and certain objectives. But who establishes these goals and objectives? What is their content? Are they immanent in the very development of things? "Towards a more efficient group" is an expression that still needs to be filled with content. Moreover, are all systems of rules that have asserted themselves in history, that have "won", more efficient than those that have "lost", that have been suspended by the court of evolution? For instance, was the system of rules introduced by the German National Socialists after 1933 more efficient than the (losing) system of the Weimar Republic?

A heavy metaphysical concept of evolution of law has been recently defended by Erhard Oelser, an Austrian professor of philosophy, who tries to connect a strong faith in the power of man's reason and a kind of biological evolutionary stance. Here

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[40] See ibid., pp. 80-81.

[41] Ibid., p. 81.

[42] For this distinction, see O. WEINBERGER, Eine Semantik für die praktische Philosophie, in "Grazer Philosophische Studien", vol. 20, 1983.

we find a model in which an idea of moral progress bases on some sort of historical and biological movement and vice versa. "Denn wie alle selbstorganisierenden Prozesse in der Natur kennt auch der Selbstkonstruktionsprozeß des Rechts keine individuelle Instanz, sondern nur einen prozeduralen Mechanismus, der jedoch in der praktischen Vernunft jedes einzelnen Menschen seinen Träger besitzt. Nur durch diesen intervenierenden Eingriff der Vernunft wird aus der Naturgeschichte die Geschichte der Menschheit. Wer daher an den Fortschritt der Vernunft in der Menschheitsgeschichte glaubt, muß auch die Kröte des Evolutionismus schlucken"[43]. This author furthermore assumes a system theory point of view, according to which the law is a system which evolves thanks to the impulses coming from its Umwelt and working through a dynamics of openness and closure similar to Niklas Luhmann's views. Nevertheless according to Oelser the legal system is not independent from morality, as it is in any Luhmannian account of it, but is quite to the opposite intrinsically ethical. "Das System des positiven Rechts ist ein von der Staatsgewalt und Politik unabhängiges, autonomes System, und zwar gerade ausschließlich deswegen, weil es in seinen Grundnormen auf diesen tieferliegenden rechtsethischen Grundsätzen beruht, die kein staatlicher Gesetzgeber dieser Welt je verletzen darf, ohne sich selbst durch das so heraufbeschworene natürliche Widerstandsrecht, den Untergang zu bereiten"[44]. Thus, a conception of the evolution of law lands in the end to (but was perhaps already from the beginning moving from) a theory of natural law.

3. Neo-evolutionary theories

Faced with the criticisms of the teleological determinism of "classical" evolutionary theories (Spencer, Darwin, etc.), there have been some attempts to reformulate the theories so as to

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[43] E. OELSER, Evolution und Selbstkonstruktion des Rechts. Rechtsphilosophie als Entwicklungstheorie der praktischen Vernunft, Böhlau, Wien 1990, p. 11.

[44] Ibid., p. 226.

avoid the antideterminist criticism. Attacks on the classical evolutionary paradigm - as Niklas Luhmann points out - come from three sides: (a) from a conception of history that emphasizes the uniqueness of the historical event; (b) from a structuralist conception that stresses the existence of non-temporal factors in societies; (c) from a viewpoint that the German sociologist calls "diffusionist", which stresses the fact that not all transformations are internal to the system or the subject under consideration[45].

The most recent reformulations of the evolutionist paradigm are fundamentally based on systems theory and on some ideas coming from modern thermodynamics. We read, for instance, in Ervin Laszlo's book, published by the Club of Rome: "The laws assumed by the sciences of complexity are neither determinist nor prescriptive: they do not determine the course of evolution in any unequivocal way. Instead, they specify some combinations of possibilities within which the evolutionary processes may unfold. These are rules of the game, which are to be used at every particular moment by the players. Starting from identical initial conditions and within the limits of the possibilities laid down by the laws, different sequences of events may come about"[46]. Thus, the laws of evolution do not determine specific occurrences, but the framework within which they take place.

But this, it may be objected, is also true of many scientific laws. The occurrence of Fulano falling in the street some day at a particular time is not determined by the law of gravity, still less predictable by it. However, in falling Fulano obeys and confirms this law. Scientific laws are conditional, which means that if the condition is not present the occurrence obeying that law does not come about. In this sense, scientific laws only

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[45] See N. LUHMANN; Geschichte als Prozeß und die Theorie soziokultureller Evolution, in idem, Soziologische Aufklärung 3, Westdeutscher Verlag, Opladen 1981, pp. 182-183.

[46] E. LASZLO, Evoluzione, Italian trans. by G. Bocchi, Feltrinelli, Milan 1986, p. 23.

offer the framework within which a great, I would say infinite, variety of occurrences are possible. They too are rules of the game, of the game of the happening of natural, or "crude" facts, or - as Ota Weinberger might say - "facts independent of men".

One of the contemporary theorists who most powerfully uses the "evolution of law" paradigm, is the German sociologist Niklas Luhmann. Luhmann states that in his view this paradigm has nothing to do with the determinism of last century's evolutionary theorists. "Evolution," he writes, "is accordingly not a causal process internal to the system, owing its power to some natural necessity; in confrontation with the system's environment, it realizes the potential for structure-changing 'learning' arising from the differentiation of those three functions of variation, selection and stabilization in the face of an independently changing environment"[47]. Moreover, he rejects the teleological evolutionary view: "evolution does not need direction indicators. In no way is it a process oriented towards an end"[48]. Luhmann also rejects models of evolution that use sequences of phases, instead defending a model of evolution founded on the internal mechanism of evolution, though, as we know, he proposes a periodization of social differentiation articulated into three phases that succeed each other in time: (i) segmentary societies, (ii) stratified societies, (iii) societies differentiated according to functional criteria.

Luhmann adapts the "system" paradigm to the evolutionary paradigm: the subjects of evolution are "systems", and the "systems" exist insofar as there is an "environment". He goes as far as maintaining that "only the difference between system and environment makes evolution possible. In other words, no system can evolve from itself. If the environment did not always evolve

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[47] N. LUHMANN, Evolution des Rechts, in idem, Ausdifferenzierung des Rechts. Beiträge zur Rechtssoziologie und Rechtstheorie, Suhrkamp, Frankfurt am Main 1981, p. 15.

[48] N. LUHMANN, R. DE GIORGI, Teoria della società, Angeli, Milan 1992, p. 185.

separately from the system, evolution would rapidly end with an 'optimal fit'"[49]. However, refuting the previous thesis, he states that "one must start from the assumption that systems can transform their structures only through their own operations, however those systems may react to what happens in the environment"[50].

For the German sociologist, the concept of evolution means growth in complexity and diversification. "As before," he writes, "evolution is understood as increasing complexity, a growth in the number and variety of possible components and events"[51]. And this evolution is founded on the "difference between world and system"[52]. "Any change in a system that establishes an increase in its potential changes the complexity of the world and thus the environment to which other systems have to adapt"[53]. However, elsewhere Luhmann criticizes the concept of evolution as growth in complexity. "The old principle," he writes, "that evolution is a process going from simple relations to complex relations is indefensible, for the simple reason that, as an evident result, today less complex systems still coexist with complex systems"[54]. Nonetheless, a few lines further on he reaffirms the relevance of complexity as an evolutionary criterion: "However, despite all these objections, one cannot deny the fact that in the course of evolution tests of complexity are performed, and that the construction of more complex systems alongside other

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[49] Ibid., p. 177. Emphasis in original.

[50] Ibid., p. 205.

[51] Op.ult.cit., p. 13.

[52] Ibid., p. 14.

[53] Ibid.

[54] N. LUHMANN, R. DE GIORGI, Teoria della società, cit., p. 185.

less complex ones come about"[55], finally reaching the conclusion that "social evolution requires a differentiation of evolutionary functions"[56], a differentiation that ipso facto cannot be a cause of greater complexity. "To describe the result of evolution in general, such formulations as that it consists in making higher complexity possible are sufficient"[57]. For Luhmann, an "evolutionary acquisition" is rather the outcome of a local reduction of complexity in order to permit, or adapt to, a general growth in complexity.

As well as the "exogenous" evolution brought about by changes in the surrounding medium there is, according to Luhmann, an "endogenous" evolution that comes about through three principal processes: (i) variation, or production of new possibilities; (ii) selection, i.e. the taking of decisions on the possibilties admissible by the system; (iii) stabilization, that is, confirmation and protection of the possibilities accepted[58]. These three processes, he adds, are also met within organic (living) systems, and there we call them: (i) mutation, (ii) survival, (iii) isolation.

As far as the law is concerned, "endogenous" evolution - which in Luhmann's theory seems to play the most important part - comes about through the growing variety in normative expectations ("variation"), which cannot all be satisfied (hence their "selection"), to the point of a new institutionalization of norms (contrafactual expectations) accepted by the system (that is "stabilization").

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[55] Ibid. Cf. ibid., p. 197, where he seems to defend the idea that "evolution produces more complex societies", and also p. 201.

[56] Ibid., p. 218.

[57] Ibid., p. 221.

[58] See N. LUHMANN, Evolution des Rechts, cit., p. 14. Cf. LUHMANN, Das Recht der Gesellschaft, Suhrkamp, Frankfurt am Main 1995, pp. 241-242.

Here, accordingly, there are various problems. First, the very concept of normative expectations, which are, according to what Luhmann says, those expectations the frustration of which does not lead to their abandonment. It seems that for Luhmann the expectation precedes the norm. But if this is so, what is the normativity (the contrafactual nature) of the normative expectation founded on? Second, if the normative expectation resists frustrations, that is, breach of the norm it refers to or better represents, is it not absurd to keep a norm that is always broken? Or, putting it differently, what normativity can be claimed by a norm that is never capable of motivating the conduct it lays down?[59] Are there limits then to the number of violations a normative expectation can or should resist? Moreover an expectation is always an eminently subjective fact, whereas a norm in order to be one has to be independent of the subject's individual psychology.

But the most serious problem I see in Luhmann's concept of "evolution of law" lies in the very concept of evolution he adopts. According to the German author, evolution is, firstly, brought about by causal relations between system and environment, and, secondly, guided by the three processes of variation, selection and stabilization. However, and in the same way as in the Hungarian author's concept of evolution considered above, these three processes represent invariables, a sort of conditions for the occurrences, which retain a certain determinist nature despite the non-determinist professions of faith repeatedly uttered by Luhmann. "They [the three processes]," writes the

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[59] For a similar critique to Luhmann's concept of normative expectation, see O. WEINBERGER, Institutionentheorie und Institutionalistischer Rechtspositivismus, in idem, Recht, Institution und Rechtspolitik. Grundprobleme der Rechtstheorie und Sozialphilosophie, Steiner, Stuttgart 1987, pp. 173-174, and O. WEINBERGER, Soziologie und Normative Institutionentheorie. Überlegungen zu Helmut Schelskys Institutionentheorie vom Standpunkt der normativistischen Institutionenontologie, in idem, Recht, Institution und Rechtspolitik, cit., pp. 199-200. See also J. HABERMAS, Faktizität und Geltung. Beiträge zur Diskurstheorie des Rechts und des demokratischen Rechtsstaates, Suhrkamp, Frankfurt am Main 1992, p. 70.

German sociologist, "define conditions of possibility and areas of operation for each other"[60]. These evolutionary mechanisms represent certain rules of the game. But who laid them down? What is his ontological or epistemological status? How can we test whether these rules are in force? Luhmann does not give us answers to these questions.

I think it may be said that in Luhmann's application of the evolutionary paradigm it is merely an interpretive model, perhaps elegant or interesting, but an interpretive model that has no privileged epistemological status vis-à-vis, say, the historicist paradigm or the conflictualist or structuralist paradigms. All of these are heuristic tools which can help us in studying human societies only if we recognize them as such.

4. Evolution as Learning

Another use of the evolutionary paradigm is the one concerned with cognitive or epistemological processes. This is the case of theories like those proposed by, for instance, Jean Piaget (who deals with the question of the child's psychological development, especially as far as his perception of reality is concerned), by Karl Popper (who tackles the so-called "growth of knowledge"), and by Lawrence Kohlberg (who is interested in the development of moral concepts in the child). It is not possible here to discuss these theories in detail. What I feel it is important to mention is that Jürgen Habermas seeks to apply this way of conceiving evolution, namely as a learning process, to social phenomena. "I make use of the idea," writes the Frankfurt professor, "that societies learn in an evolutionary fashion by 'institutionally embodying' rationality structures already manifested in cultural traditions, that is, making use of them

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[60] N. LUHMANN, Geschichte als Prozeß und die Theorie soziokultureller Evolution, cit., p. 184.

to reorganize systems of action"[61].

This theoretical viewpoint believes it can epistemologically justify its evolutionary claims by distancing itself from the idea of an objective spirit that runs through history and gives it meaning and direction. Instead, it talks of an "evolutionary logic", seen as nothing more than the set of rules underlying the collective learning processes that underlie the positive ethics that is socially in force. "The logic of development," writes Klaus Eder, "does not mean (though this has often been suggested) an objective spirit that hovers over history or manifests itself in history. Developmental logic means something genuinely empirical: namely the rules underlying the collective learning processes in which people seek to agree on a collectively shared ethics"[62] stages.

The neo-evolutionary conception based on the notion of learning very strongly criticizes the system view, accusing it of still being centred in the idea of an "exogenous", or "external" evolution caused or guided by a system's adjustment to changes in the environment. On the system view, "endogenous" or "internal" evolution would still be subordinate to "exogenous" or "external" evolution. It is the fundamental assumption of

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[61] J. HABERMAS, Überlegungen zum evolutionären Stellenwert des modernen Rechts, in idem, Zur Rekonstruktion des Historischen Materialismus, III ed., Suhrkamp, Frankfurt am Main 1982, p. 260. However, Habermas adds that "societies 'learn' only in a metaphorical sense (in einem übertragenen Sinne)" (J. HABERMAS, Einleitung: Historischer Materialismus und die Entwicklung normativer Strukturen, in idem, Zur Rekonstruktion des Historischen Materialismus, cit., p. 36).

[62] K. EDER, Kollektive Lernprozesse und Geschichte. Zur Evolution der moralischen Grundlagen politischer Herrschaft, cit., p. 117. This viewpoint requires strong holistic assumptions: "The developing entity in social evolution is not the individual, but culture" (K. EDER, Learning and the Evolution of Social Systems. An Epigenetic Perspective, in Evolutionary Theory in Social Science, ed. by M. Schmid and F.M. Wuketits, Reidel, Dordrecht 1987, p. 102). "Society learns. This often contested Durkheimian idea is to be defended against all forms of individualistic reductionism" (ibid., p. 124).

Habermas's and Eder's neo-evolutionary critique that evolution cannot be explained just by the interaction between system and environment. That the effects of a system change the environment and that this environment reacts on the system's structure does not explain why the system responds to the changes in the environment in one particular direction and not another. The conclusion is then the following: "Social cultural evolution - and this is the general assumption of the theory of evolution - is characterized by a primacy of internal evolution over external evolution. Speaking of internal evolution means assuming active operations and learning processes in the system that is adapting"[63].

For his evolutionism, Habermas uses the model of the child's moral evolution offered by Lawrence Kohlberg. This American scholar identifies three levels, each consisting of two stages, making a total of six stages, in the child's moral development. Moreover, Kohlberg relates each of these levels to a level of cognitive development.

The three levels of moral development "discovered" by Kohlberg are as follows: (a) the first is the "preconventional" level, founded on a cognitive level which is that of "concrete, operational thought"; (b) the second level is the one called "conventional", the cognitive counterpart of which is again "concrete operational thinking"; (c) finally, the third moral level is the "postconventional" one, based on the cognitive level of "formal-operational thinking"[64].

The "preconventional" level consists of two stages: (i) in the first, moral conduct is oriented towards avoiding punishment, and what is right is considered in terms of physical consequences of

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[63] K. EDER, Geschichte als Lernprozeß? Zur Pathogenese politischer Modernität in Deutschland, Suhrkamp, Frankfurt am Main 1991, p. 24.

[64] See L. KOHLBERG, Essays on Moral Development, Harper & Row, London 1981.

action; (ii) in the second, defined as "instrumental hedonism", what is right is everything that instrumentally satisfies the subject's needs.

The two stages of the "conventional level" are (i) the first called the "good-boy orientation", where what is right is what is approved by and pleases those who are close to and around the acting subject, and (ii) the second, the "law and order orientation", where what is morally right is regarded as what respects the social authorities and conforms with the duties established by those authorities. Finally, the postconventional level consists of (i) the contractual-legalist stage, where what is morally right is defined in terms of rules and principles laid down in critical fashion and by the whole community, and (ii) the universalist stage (universal-ethical principle orientation), where what is morally right is defined by a decision of conscience in accord with ethical principles chosen by the subject himself, whose minimum requirements are universalizability and consistency. At the various levels, different mechanisms of sanction operate. At the preconventional level, the sanction is physical punishment; at the conventional level the sanction is a feeling of shame or regret, and finally at the postconventional level a feeling of guilt. Also different at the various levels is the scope of validity of the ethics: at the preconventional level it is the natural and social environment perceived as something non-differentiated; at the conventional level, as far as the first stage goes, the people with whom there are direct relations; and as far as the second stage goes, members of the socio-political group considered. At the postconventional level, the scope of validity will, at the first stage, be all those belonging to the social group, and at the second stage, particular subjects considered as individuals[65].

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[65] To a certain extent the theory of the child's moral levels developed by Kohlberg recalls Comte's conception of the three evolutionary stages of the human mind: theological, metaphysical, positive (see e.g. A. COMTE, Discours sur l'esprit positif, in idem, Oeuvres, tome XI, Anthropos, Paris 1970).

Habermas, and Klaus Eder, seek to transfer this evolutionary scheme to the various historical types of societies. Thus, according to them, to the preconventional moral level there correspond the vorhochkulturelle Gesellschaften, primitive societies, to the conventional level the archaische Hochkulturen and entwickelte Hochkulturen, and to the postconventional level the societies of the Frühe Moderne. In primitive societies (vorhochkulturelle Gesellschaften) there is no distinction between rules and actions; a sort of objective responsibility prevails, with as sanction reprisal. In developed societies, in the first stage (archaische Hochkulturen) a differentiation takes shape between rules and actions, an individual concept of responsibility is applied and there may be sanctions similar to our penalties. In the second stage (entwickelte Hochkulturen), one for the first time meets forms of jurisdiction. In the Early Modern Period (Frühe Moderne), finally, there is further differentiation between rules, actions and principles justifying the rules, the law becomes highly formalized and political power is moralized to the point of bureaucratization.

Basing himself on Kohlberg's theories, Klaus Eder distinguishes two basic forms of political power (politische Herrschaft): (i) conventional political power (konventionelle Herrschaft) and (ii) post-conventional power (postkonventionelle Herrschaft). In the first type "the moral foundations of political power derive directly from the order of the world"[66], and "the fact that political power is collectively accepted results from the universal order seen as objectively given"[67]. In the "conventional" type of political power, natural reality seems to be reflected and duplicated in social reality. In the "post-

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Evolution from the "theological" stage to the "positive" one takes the form, to be sure, of phylogenesis, but one cannot rule out this evolution being also conceived of as ontogenetic.

[66] E. EDER, Kollektive Lernprozesse und Geschichte. Zur Evolution der moralischen Grundlagen politischer Herrschaft, cit., p. 119.

[67] Ibid.

conventional" type of power, instead, "the fact that political power is accepted results from the power's insertion in, or better subordination to, a universalist moral order"[68]. Here "social reality no longer coincides with the objective order of the world"[69]. All this has as a consequence that in the "conventional" form of power no criteria are available to locate oneself reflexively vis-à-vis the power, while in the situation of "post-conventional" power this critical attitude is possible.

These divisions into periods suggested by Habermas and Eder are certainly interesting, perhaps more interesting than many other typologies. What seems questionable is whether this succession of periods constitutes an evolution, in the sense of having any sort of element of necessity or "progress". Still more questionable is the combination of an ontogenetic perspective (the child's moral evolution) and a phylogenetic one (the evolution of the various types of societies), and the analogy set up between the evolution (even if "moral") of living creatures and the evolution of social entities.

As Ernst Tugendhat points out, the thesis of the evolution of concepts of moral justification has three conditions. (i) That there be manifold, distinct concepts of moral rationality. (ii) That these concepts can be ordered, classified, according to a hierarchy in which each higher stage also represents an increase in rationality. (That is to say that the various moral conceptions can be put in order according to a criterion that allows them to be seen as an advance in rationality). (iii) Finally, that the criterion that allows us to assert the growing rationality of the various moral systems be also a temporal, historical criterion. (That is to say that the "higher" stage of moral rationality be the later in time or more recent from a

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[68] Ibid., p., 120.

[69] Ibid.

historical viewpoint)[70]. However, in (ii) the ordering criterion cannot be anything but a moral conception, and in (iii) one has to assume that history gua history is moral, thus falling into an intolerable metaethical historicist cognitivism, which by assigning the historical present a predominant ethical value invalidates any attempt at reflexivity on and moral critique of the status quo.

Habermas does not manage to get out of the dilemma between evolutionary (functionalist) temptations and recognition of the need for a normative (independent) viewpoint. At one point he asserts the existence of an evolutionary trend internal to certain normative regulations or certain principles, such as the fundamental rights of man. "When fundamental norms, like the right to free expression of opinion or the right of participation in universal, free and secret elections," he writes, "are once recognized in principle and allowed, then the applications too by no means vary arbitrarily from one situation to another, but at least in the longer view take the directed course of an ever more consistent realization of their universal content"[71]. And at another point he maintains that this does not mean assuming any sort of historicist position: "everything could have happened differently"[72], subsequently contradicting himself by the following assertion: "from the history of human rights, we can derive indications to maintain that the power of judgement by practical reason (die Urteilskraft zur praktischen Vernunft) does not come about by chance"[73]. However, when facing

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[70] E. TUGENDHAT, Zur Entwicklung von moralischen Begründungsstrukturen im modernen Recht, in Argumentation und Recht, ed. by W. Hassemer, A. Kaufmann, U. Neumannn, Steiner, Wiesbaden 1980, p. 5.

[71] J. HABERMAS, Erläuterungen zur Diskursethik, Suhrkamp, Frankfurt am Main 1991, p. 43, Cfr. J. HABERMAS, Moralbewußtsein und kommunikatives Handeln, Suhrkamp, Frankfurt am Main 1983, p. 115.

[72] J. HABERMAS, Erläuterungen zur Diskursethik, cit., p. 44.

[73] Ibid.

"communitarian" and objectivist conceptions offering as rationality criterion of a "form of life" the promotion of the integration and stability of social practices, he objects: "What is functional to the maintenance of a life practice cannot be called ethics"[74].

In fact the theories of Habermas and Eder, and still more of Luhmann, are to a certain extent products of a rooted functionalist Weltanschauung, since they are theories that must assume an intrinsic rationality of social entities, that is, certain normative qualifications (the rationality criteria) independent of any reflexive, subjective or intersubjective consideration. Thus, societies are once again seen through a model of interaction between system and environment. In this model, however, the question immediately arises what criteria are to enable us to distinguish between system and environment, and how to establish the identity, and accordingly the limits, of the system.

Eder's critique of Luhmann can be turned against its own author. "The theoretical view," objects Eder against Luhmann's evolutionism, "is too general: the evolution of a system cannot be explained on the basis of the interaction between system and environment alone. Variation, selection and stabilization do not simply happen on a basis of "rationality of connection". Instead, they happen according to particular viewpoints, and the point is to identify these viewpoints"[75]. The question, then, is what these viewpoints (Gesichtspunkte) are that regulate the variation, selection and stabilization of the development of a "system". They are normative viewpoints, which as such cannot merely "be there", since they must in some sense be external to the system itself, that is, external to its objective structuring.

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[74] Ibid., p. 41.

[75] K. EDER, Geschichte als Lernprozeß? cit., p. 22. Emphasis in original.

Similarly, one might use against Eder (and against Habermas) the objections Eder brings against the theories of social Darwinism. Social Darwinism breaks down because of its failure to recognize the role played in social actions by human reflexivity. Thanks to this, the social actor can wonder about the course of events, evaluate them, and if appropriate decide to act against them. "Where sociological Darwinism," writes Eder, "ultimately fails is on the fact that social actors can relate reflexively to themselves and to their environment. This possibility of relating in an objectivizing attitude to oneself and to the environment makes possible the taking of a critical distance to the given. This constitutes an inner reality that contrasts with an outer reality and can not only strengthen but also oppose its selective effectiveness. This capacity, however, breaks through the conceptual framework of the Darwinist theory of evolution"[76]. Nor, however, can the reflexive capacities of the social actor be based on the neo-evolutionist scheme founded on the assumption of learning by social systems, if this is to mean something "objective" of the systems's own. The system is in fact "condemned" to be examined, assessed and "elaborated" reflexively by the actor. Thus, to explain a trajectory of social actions, or the development of a "system", this reflexivity has to be taken into account. It is expressed in the values, principles, and criteria adopted by the actor himself.

The understanding of social conduct, the study of social phenomena, require what I would call, following a proposal by Neil MacCormick, "the internal cognitive viewpoint", that is, the serious consideration of the ideas, intentions, rules and principles of social actors. And a serious consideration of ideas, intentions, etc. of social actors rules out their reduction to elements of an "ideology", a subjective disguise for objective causal determinants. An evolutionist posture in social sciences implies, by contrast, either the assumption of an external viewpoint, that is, one oriented solely to establishing

[76] Ibid., pp. 28-29.

regularities of a more or less causal type, fairly insensitive to the reasons for social actions from the agent's viewpoint (that is, those propositional contents that may constitute premises for an argument whose conclusion is the need to perform some particular conduct), or else the assumption of a strongly normative internal viewpoint, that is, in this case, a viewpoint of someone who takes over, adopts, the normative criteria of the society or community of which he is an observer and member, to apply them to societies or communities of which he is only an observer.

The sole theoretical and not ideological uses of the concept of evolution possible within the sphere of the social sciences are metaphorical and with purposes of classification. As far as social groups at any rate are concerned, evolution does not represent an objective, finalized movement, a law of teleological type even if with no preestablished goal, nor a linear process that would enable us fairly positively to assess what happened "after" and relatively negatively assess what happened "before", nor any dynamic objective of adaptation or learning.

"Evolution" if one wishes to maintain the term, cannot be more than the passage of time and transformation. This time and this transformation have no meaning, still less value in themselves. Meaning and value come from the rules of the society considered, and from the viewpoint adopted by the social actors. Thus one might, perhaps, adopt the definition of social evolution given us by Eder: "social evolution is the substitution of one principle of social organization by another"[77], without adding that "the change in principles of organization presupposes instrumental cognitive learning processes"[78].

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[77] K. EDER, Die Entstehung staatlich organisierter Gesellschaften. Ein Beitrag zu einer Theorie sozialer Evolution, Suhrkamp, Frankfurt am Main 1980, p. 167.

[78] Ibid.

5. Law as Autopoiesis

One of the most important theories of evolution of law recently proposed is Gunther Teubner's. To begin with, the German scholar distinguishes between "evolutionist" and "evolutionary" conceptions: the former are seen as conceiving evolution as directed towards a particular goal, and the latter as being founded on the mechanisms that enable evolution, leaving aside any consideration of any end it may have. While the former are loaded with normative and metaphysical elements, the latter - what Teubner calls "evolutionary concepts" - are taken to be less criticizable at epistemological level. "The theory of evolution," says this German lawyer, "is concerned with - and should confine itself to - the question of how mechanisms form that select structural patterns from blind variation, make them last and thus control the development of systems"[79].

"Evolutionary" theories do not, according to Teubner, take on the task of offering predictions about specific happenings, but that of predicting "structures" within which the shape of specific occurrences is fairly arbitrary. Thus he believes that these theories cannot be objected to on the ground that they are founded on determinist metaphysics. Still less can they be accused of not managing to predict specific social occurrences. By comparison with traditional evolutionism, the "reformed" evolutionism proposed by Teubner is characterized by three features: (i) a "blind" development through the mechanisms of variation, selection and stabilization; (ii) the combination of ontogenesis and phylogenesis; (iii) the coevolution of environment and system.

As we see, Teubner maintains that the typical mechanisms of evolution are "variation", "selection" and "stabilization" (which he also calls "retention", Retention). For him, this paradigm differs from the traditional evolutionist models by stressing the

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[79] G. TEUBNER, Recht als autopoietisches System, Suhrkamp, Frankfurt am Main 1989, p. 63.

fact that the interplay of the three mechanisms is "blind", that is, has no preestablished goal. Moreover, the post-Darwinist evolutionism proposed by Teubner is characterized, by comparison with Darwinist evolutionism, by not reducing the subjects, the protagonists, of social evolution to biologically definable entities. The subjects of evolution are here instead systems of social communication. "Evolution in the sense defined here, as interplay of variation, selection and retention, can occur at all in society and law only once the corresponding mechanisms are formed in the communicative sphere. The unit of social or legal evolution is however neither the human individual, nor a group of people, nor a "selfish" gene, but society or law themselves as systems of social communication"[80].

Theoreticians of "evolution of law", in general conceived of as an outcome of the evolution of society face two problems with no solution in a view of evolution of law as being determined by the development of social forces. These two problems are: the stasis sometimes present in legal systems despite changes in the social system; the conservation of the identity of the legal system in a position where it is continually subject to the development of the social system.

Traditional evolutionism bases the evolution of law on a dynamics that can more or less be traced back to the one between structure and suprastructure elaborated in Marxist thought: society as structure being held to determine law as suprastructure, in unidirectional fashion. To this evolutionism Teubner counterposes a conception centring round the idea of co-evolution. This he manages thanks to his theory of autopoiesis, according to which social systems, including law, are closed systems that reproduce themselves through internal dynamics, not through external stimuli. This does not mean that the environment does not exercise some influence on the "system", but this happens through "perturbations", "turbulence", to which the system responds by

[80] Ibid., p. 67.

in every case following "reflexive" mechanisms of its own. "To date," writes Teubner, "the introduction of autopoiesis into legal evolution has led to the impression that evolution is internalized in the social sub-systems and takes place only as an isolated development within autonomous social spheres. It would certainly be wrong to exclude the environment from evolutionary processes. Autopoietic closure does not mean that the system is independent of the environment. But the relation with the environment in evolution is not produced in direct, causal, external production of legal developments, but in processes of co-evolution, in which the co-evolving systems act on each other in perturbatory fashion"[81]. This "perturbing" relation between system and environment is, following Luhmann's proposal, called "structural coupling".

As we have seen, Teubner aspires to the rehabilitation of evolutionism. He pursues this aim through an elaborate strategy. Its fundamental impact is the presentation of a "new" evolutionism, distinguished from the traditional (Darwinian, Spencerian) type, as I have said, by the following characteristics: (i) Evolution has no pre-established goal. (ii) It is not a markedly determinist movement, so that it can establish predictions only of structures of facts and not of specific facts: "I think that a theory of legal evolution has great analytical and practical power if it withdraws its extensive explanatory claims and returns to pure pattern predictions [...] A theory of legal evolution will therefore only be in the position to explain general structural patterns of the legal system, but not individual legal events"[82].

(iii) The relation between system and environment is revised, so that they now appear to influence each other mutually. This is not a unidirectional relation where the environment determines

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[81] Ibid., p. 78.

[82] G. TEUBNER, Evolution of Autopoietic Law, in Autopoietic Law: A New Approach to Law and Society, ed. by G. Teubner, de Gruyter, Berlin 1988, p. 226.

the system (in the case of the law: where the social system determines the legal system), but a bidirectional relationship, where environment and system influence each other reciprocally (thus, co-evolve). Teubner further affirms that the perturbation of the social system on the legal subsystem, since it is not unequivocally determinant, is not a causal relation, and accordingly that the concept of co-evolution cannot be accused of being a determinist theory: "The environmental reference in evolution however is produced not in the direct, causal production of legal developments, but in processes of co-evolution"[83].

(iv) The evolution of social systems is seen as not having much in common with the evolution of living systems, since social systems are not conceived of as groups, collectivities, assemblies of living individuals, but as cultural phenomena, communication networks: "Evolving units are not, as social Darwinsim has it, human individuals and their aggregates, groups, organizations, nations, races, but socio-cultural phenomena"[84]. Thus the fact of biological evolution could not in any way be the basis for the existence of a social evolution. (This also seems to be the opinion of Luhmann: he states that "from the fact that there exists an evolution of living systems one cannot draw the conclusion that there would have to exist an evolution of social systems"[85]). In this connection Teubner brings a criticism against Habermas's evolutionism, which as we have seen connects ontogenesis and phylogenesis, or rather evolution of the individual's moral sense and social evolution, inasmuch as Habermas on the one hand seems to reintroduce finality into the evolutionary movement, but mainly because the Frankfurt philosopher bases social evolution on psycho-physical phenomena (moral evolution), without clarifying how it is possible for the

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[83] Ibid., p. 235. My emphasis.

[84] Ibid., p. 228.

[85] N. LUHMANN, R. DE GIORGI, Teoria della società, cit., p. 188.

evolutionary mechanisms of individual psychology to be transferred to social entities, since the latter cannot be reduced to a mere sum of psycho-physical individuals[86]. Teubner proposes an alternative conception of the combination between ontogenesis and phylogenesis: the former would consist of the individual legal occurrences (in particular, individual proceedings), while phylogenesis would appear in the legal tradition. "Thus, the interplay of phylogenetic and ontogenetic development in law can be conceived as the linkage of two communicative cycles. The particular legal proceeding is in a sense the laboratory of law in which variations are produced and selection tried out. This is linked to the second communicative cycle which decides about the stabilization of legal selections in legal culture and legal tradition"[87].

Now as far as (i) is concerned, the concept of "blind" evolution counterposed by Teubner to the "classical" concept of evolution with a pre-established goal, it has to be said that he over-dramatizes the counterposition. In fact evolutionism (including the "classical" variety) differs from historicist philosophies just by doing without a "goal" of history, though it keeps the idea of a movement intrinsic to history itself. As far as (ii) is concerned, as we have already said the fact that the laws of evolution do not determine or allow the prediction of specific occurrences does not distinguish them from other scientific laws. Moreover, even in the modern version proposed by Teubner, there remains the idea of determination, at least of "structures", brought about by the evolutionary dynamic, a determination brought about in accordance with relations that
continue to be causal. This means that we are not very far here from the traditional determinist approach.

As far as (iii) is concerned, it should be recalled that according to Teubner society and law constitute autopoietic

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[86] See G. TEUBNER, op.ult.cit., p. 226.

[87] Ibid., p. 235.

systems, that is to say, systems closed in on themselves, communicating with other systems only through "perturbations" and "noise". Here we certainly meet something new by comparison with "classical" evolutionism, but this novelty accentuates rather than attenuates the typical idea of evolutionism: the existence of an intrinsic movement in the entity ("system") considered. The intrinsic nature of development (of "evolution"), from an autopoietic viewpoint, is raised to the extreme. Moreover, one might raise against this aspect of Teubner's theory a criticism used by Klaus Eder against Luhmann. The fact that the system reacts on the environment and that the relation between the two is mutual does not yet tell us what are the "viewpoints" and criteria for this mutual influence. This, however, is just what is relevant in the explanation of social phenomena. Finally, when he tells us that co-evolution is not causal determination, it seems that Teubner is juxtaposing the unambiguousness or unidirectionality of the causal relation with causality itself. The confusion is between a "sufficient" or "direct" (in his terminology) cause and a cause "in general", since not all causes have to be "sufficient" or "direct" in order nonetheless to continue being causes of certain effects.

Moreover, we can perceive some uncertainty in Teubner's defending the thesis of communication of mutual "perturbations". Confronted with the many connections law entertains with, for instance, morality, economic policies and politics, he has to assume a "general social communication"[88]. That means that the system of law and other social systems (education is a further case together with family etc.) can be in touch on the same issue. This allows more than mere observation or regulation between the various systems, that is, a real communication. This communication nevertheless is not based on some discourse or rules common to the various systems, a "Superdiscourse" - as Teubner says; it is simply the outcome of the fact that the

[88] See G. TEUBNER, Die Episteme des Rechts, in Wachsende Staatsaufgaben - sinkende Steuerungsfähigkeit des Rechts, ed. by D. Grimm, Nomos, Baden-Baden 1990, p. 107.

various systems undergo an event which takes place at precisely the same time in each of them. "Contemporaneity" guarantees for communication[89]. Each autopoietic system works on its own, thanks to its own rules, and the acts each of them undertakes at a certain time can be the same, that is, communicative, only because of their contemporaneous taking place. Now, as Habermas has pointed out,[90] contemporaneity does not guarantee the identity of an expression if there is not a common semantical rule, that is, a common, shared body of linguistic rules. On the other side, in the causalist perspective assumed by Teubner the contemporaneity of the "same" act is fully due to a chance. If we had at this point of time contemporaneity, we cannot be sure that we shall have it in the future, and in any case we cannot foresee the moments or the occasions in which we shall have contemporaneity again. This of course makes communication not only instable, but indeed impossible, since any expectation of being understood will base on a difficult calculation of probabilities. Unless we assume perturbations or interferences between systems governed by iron laws as those which direct planets' revolutions. This would mean falling once again into a determinist theory, a solution which Teubner - I suspect - would hardly find satisfactory.

As regards (iv), it should be recognized that Teubner explicitly distances himself from conceptions like social Darwinism and other more recent ones that propagate the idea of the "selfish gene" ("sociobiology"), and that he criticizes the basing of social evolution on biological or even psychological mechanisms. It is nonetheless the case that the concept of autopoiesis with which Teubner connects the concept of evolution comes from the world of biology. Biologists were, as we know, its first theorists. It is equally true that this concept carries within itself on the one hand the conviction that the same mechanisms (even if very abstract) function both in living processes and in

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[89] Ibid., p. 27.

[90] See J. HABERMAS, Faktizität und Geltung, cit., pp. 73 ff.

social relations, and on the other the illusion of possessing a key to understanding a whole series of actual phenomena. In this aspect, autopoietic theory comes out with much stronger ambitions than those cherished by "classical" evolutionism.

For an assessment of Teubner's theory, one must further analyse its content, its substantive aspect, that is, the more concrete (or less abstract) description it gives us of the "functions" of the evolution of law. This is in the first place, as we have seen, conceived of as endogenous evolution, since the law is defined as a closed, self-reflexive system whose only link with the outside is through perturbation. It'should be added that for the German scholar there are two aspects of evolution of law: one before and one after the formulation of law itself as an autopoietic entity. Thus, it should be stressed, autopoiesis does not explain the whole evolution of law. In the pre-autopoietic condition the functions of variation, selection and retention are outside the legal system: "in a pre-autopoietic condition of law, all three functions are fixed in societal institutions and therefore are external to the legal system"[91]. It is only once there is autopoiesis that the free evolutionary mechanisms can be internalized, since from that point on "evolution can [...] only be 'triggered off' from outside, but no longer directly caused"[92]. "Variation" thus does not derive from greater complexity in social rules and interests. Nor does it depend on conflicts in society. The same applies to transformations in the theory of law. They are of causal relevance for the evolution of law only indirectly. As far as selection goes, "social approval of the norm is no longer the factor governing selection"[93]. This function depends entirely on the internal compatibilities of the legal system. Finally, "retention" too has nothing to do with social processes, so that it is the legal system itself that predetermines the conditions for its own change.

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[91] G. TEUBNER, Evolution of Autopoietic Law, cit., p. 233.

[92] Ibid.

[93] Ibid., p. 234.

The "moral" of this theory is an absolute autonomy of the legal dimension, such as even Hans Kelsen, so attached to the purity of the legal "ought", would never have ventured to uphold. According to the autopoietic theory, the validity, legitimation, justification and even transformation of law are possible only within the frameworks pre-established by the law itself. Ultimately, the theory of autopoiesis looks like a conservative paradigm. This impression might also be confirmed by the fact that when Teubner discusses the relation between ontogenesis and phylogenesis, that is, between the individual legal proceeding and the legal tradition, and describes the case of divergent expectations, of the breakdown of interaction or of the expulsion of alternatives regarded as incompatible, he adds that a real breakdown can effectively arise only at the ontogenetic level. At the phylogenetic level it is a fairly unlikely possibility. "A real disintegration can correspondingly not occur on the phylogenetic level or is only conceivable as an extreme borderline case"[94]. Thus, the image that the theory of autopoiesis conveys to us is one of a legal system immune to conflicts, to political and social changes, and even to the "hard cases" that may throw the consistency and self-integration of the order into crisis. Here, paradoxically, a view of the legal order as closed, complete and self-sufficient (a rigidly legal formalist concept, accordingly) is linked through the pathway of sociological reflection, which by its history and nature would seem to have to be more open and sensitive to the dynamics and needs of society than any legal doctrine.

The theory of autopoietic law is two things at once: a sociological theory and a rather radical legal formalist conception. Behind it, at any rate, one can discern an option de lege ferenda in favour of "reflexive" law, that is, not instrumentalized by the State, which is extraneous to many legal formalist theories. His error, I feel, is to posit too strict equivalence between "autonomous" (self-referential) law and non-

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[94] Ibid., p. 236.

instrumentalized law, just as, on the other hand, he trusts to the equivalence between "positive" law and "liberal" law, or rather between "legal positivism" and "liberalism". It suffices to review the "evolution" of modern political and legal institutions to realize that the figure of the State has been constructed theoretically, (and practically as well) as a positive, autonomous legal order, as an autopoietic system in other words, not necessarily in the direction of the domestication of its power, but even in the opposite direction: to affirm a claim to absolute dominance.

6. Towards a Critique of the "Evolution of Law" Paradigm

Finally, we come to the central question of these considerations: what use can be made of the paradigm of "evolution of law"?

One might understand this expression in the sense of "progress of law", Rechtsfortschritt in German. One might, I feel, plausibly speak of "progress of law" if one applied the term "progress" to a specific situation assessed in relation with definite criteria. In this case "progress" would be equivalent to a positive assessment in relation to a particular criterion, an assessment that would as its object have a specific state of affairs. Thus, I would not have much doubt about treating as "progress of law" legislation that allows divorce by comparison with legislation that does not.

By contrast, it would be unacceptable to speak of "progress" in a general sense in relation to a series of temporally distinct, successive situations, without bringing out any normative criterion, but assuming that this is intrinsic to the temporal movement. This would be a highly metaphysical conception, founded on a (rather optimistic) philosophy that assumes that history is pursuing a goal and is unfolding towards it. Behind the idea that history pursues a goal we might perhaps glimpse the idea of the end of history, its conclusion and fulfilment. The roots of this

idea are clearly religious[95].

The conception of a general "progress of law" has strong eschatological aspects; and an eschatology can only be a question of faith, never of scientific verification nor of common sense. From human experience, nothing and no one can verify such a view of history. Perhaps experience shows us the contrary: that history has no meaning, no purposes, that in it everything is, when all is said and done, pretty absurd.

"Does there really exist a progress of law in history?" asks Ottfried Höffe[96]. The reply is as follows: "There are always changes in law. But mere changes do not yet imply progress. One can speak of progress of law only where the changes bring improvements"[97]. If one assumes the presence of progress in the history of men, says Höffe, one has to assume that "we are subject to forces pushing us in a particular direction"[98].

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[95] All this is penetratingly seen by Plessner: "As long as the idea of the end of history by internal self-transcendence has validity, the connection with the Christian view is guaranteed, even if the historical contents lose their transcendental nature thereby and become humanized, even if the structures of the epochs shift or disappear entirely. The end of history as its fulfilment, the absolutely original directedness of its movement towards that goal in which it ends, the stepwise realization of the significant plan not only through the mouth of annunciation and prophecy but through the course of events itself; these are the categories, indeed the formalizable categories, of the universal historical consciousness. Originally met by the Christian faith, they are still retained even by later faithlessness as the ordering principles of historical understanding. Thus, they outlast the decay of religion by fading into forms of an ultimately inward overall patterning of historical happening" (H. PLESSNER, Op. cit., pp. 106-107).

[96] H. HÖFFE, Gibt es in der Geschichte einen Rechtsfortschritt?, in idem, Den Staat braucht selbst ein Volk von Teufeln. Philosophische Versuche zur Rechts- und Staatsethik, Reclam, Stuttgart 1988, p. 133. See also R. DREIER, Das Fortschrittsproblem in rechtstheoretischer Sicht, in Rechtswissenschaft und Rechtsentwicklung, ed. by U. Immenga, Schwartz, Göttingen 1980, pp. 1 ff.

[97] Ibid.

[98] Ibid., p. 143.

Though the subjects, the protagonists, of this progress are human beings, it is assumed that the progress of law "unfolds 'behind their backs', that is, follows a secret plan"[99]. This plan is mysterious to us, and cannot be other than a product of Gods, whose morality seems rather questionable.

However, as we have seen, some evolutionary theorists deny that their concept of evolution has anything to do with the notion of progress. Evolution of law would thus not be equivalent to "progress of law", would not have any evaluative component, would be value neutral. Nonetheless, the concept of evolution cannot be metaphysically or ontologically neutral. Thus, either the concept of evolution means only a transformation between states of affairs, and in this case it is fairly devoid of content and theoretically rather uninteresting; or the concept of evolution amounts to the idea of a guided, finalized movement, in which case one would have to have recourse to a more or less historicist or teleological, or downright eschatological, metaphysics. In the latter case one would have to assume the existence of intrinsic forces driving the temporal course of the phenomena under consideration. In any case, in theories of evolution there is a constant temptation to confuse the level of description of actual facts, that is, the empirical study of reality, and the level of prescription of a state not yet existing that is nonetheless taken as just and desirable, that is, a normative theory. This confusion is even recommended by Gunther Teubner when he writes that "one should not adhere to the wrongly posed alternatives of description versus prescription"[100].

Every evolutionary theory seems to amount to the assumption that between three or more specific facts causally connected with each

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[99] Ibid.

[100] G. TEUBNER, Evolution of Autopoietic Law, cit., p. 225; for a critique of this position cf. E. BLANKENBURG, The Poverty of Evolutionism. A Critique of Teubner's Case for "Reflexive Law", in "Law and Society Review", vol. 18, 1984, p. 282.

other there is a single scientific law connecting them all among themselves. As Karl Popper writes, "no sequence of, say, three or more causally connected concrete events proceeds according to any single law of nature. If the wind shakes a tree and Newton's apple falls to the ground, nobody will deny that these events can be described in terms of causal laws. But there is no single law such as that of gravity, nor even a single definite set of laws, to describe the actual or concrete succession of causally connected events"[101].

Through experience we cannot immediately solve the problem of evolution. By experience we cannot arrive at knowledge of whether the temporal course of human societies and legal orders represents, or constitutes, or is interpretable as "evolution". We are left with an a priori hypothesis of evolution. But how is that possible? The answer might be as follows: "It is possible only if whose who assert evolution realize and organize the facts on which their assertions are based. This conclusion is not implausible as far as jurists go; their theories at least contain a mixture of descriptive elements and prescriptive elements. It might be that the jurist who asserts evolution towards, for instance, greater autonomy of law or towards "reflexive law", is working in this direction. However, there are two problems here that are hard to solve.

(i) That the assertion of an end and action to secure it coincide can arise only looking towards the future, that is, between two states, the present one and the future one reachable through present action thanks to its direct consequences. The past remains ipso facto unreachable, as does a little more remote future where the action of evolutionary theory can never manage to have effects. (ii) Though the theorist's action is exercised on an immediate or reachable future, the theorist, just like any other human subject, will never secure complete control over all

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[101] K.R. POPPER, The Poverty of Historicism, Routledge & Kegan Paul, London 1979, p. 117.

> the causes of the facts that constitute the predicted or theorized evolutionary state. It is always possible, and likely in the case of the jurist shut up in his ivory tower, that the human subject cannot steer the causal determinants in the direction of the planned or theorized goal.

In any case, I think that once we have accepted the concept of law as "institution", which I have very briefly sought to present in the first section of these notes, we cannot accept a "strong" notion of evolution of law, that is, as an directed transformation covering a fairly broad series of temporal instants. "Institutions", as I have already said, represent something "new" in the temporal course of phenomena. This "novelty" results from two factors: (i) from the rules that are the "causes" of the sphere of actions opened up by them, which did not exist before these rules; (ii) from the specific actions of human beings who use or utilize the possibilities of action brought by those rules, that is, attribute an "intention" to them.

As has been pointed out by Wittgenstein, and before him by Kant, rules do not regulate their own application. "Rules," writes H.L.A. Hart, "cannot provide for their own application"[102]. We may, obviously, have a meta-rule that regulates the application of a particular rule, and then yet another meta-meta-rule for the application of the meta-rule, and so on. But we cannot allow ourselves meta-rules ad infinitum. At some point, at some level of normative discourse, we can no longer have recourse to another

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[102] H.L.A. HART, Problems of the Philosophy of Law, in idem, Essays in Jurisprudence and Philosophy, Clarendon, Oxford 1988, p. 106, and compare H.L.A. HART, Jhering's Heaven of Concepts and Modern Analytical Jurisprudence, in idem, Essays in Jurisprudence and Philosophy, cit., pp. 274-275. See I. KANT, Kritik der reinen Vernunft, B 171 ff., and idem, Kritik der Urteilskraft, Introduction, and see e.g. L. WITTGENSTEIN, The Blue Book, cit., p. 33, and L. WITTGENSTEIN, Philosophische Untersuchungen, cit., p. 58 (I, 68: "There is, for instance, no rule about how high one can throw the ball in tennis, or how hard, yet tennis is a game and has rules"), p. 67 (I, 84), p. 68 (I, 85).

meta-rule; we need criteria for applying the rule which are not regulated, such as prudential considerations or - as Klaus Günther suggests - Angemessenheitskriterien, criteria of appropriateness[103]. Consider Gustavo Zagrebelsky's following thought on the relation between law and its application to specific cases: "The written law in statutes serves to give cases the rule appropriate to them. But what that consists in is not in the exclusive power of legislative law to determine"[104]. The rule does not regulate its application nor guarantee against its abuse, nor can it by itself prevent its own breach. As Giacomo Leopardi says, "abuse and disobedience of the law cannot be prevented by any law"[105].

All this has as a consequence that the specific form of an "institution" cannot be fully determined by its constitutive norms or rules. The constitutive norms in fact do not by themselves constitute the object they deal with, but constitute necessary but not sufficient conditions for the constitution of their object. An "institution" is constituted only if there are specific actions that confer, so to speak, "intention", that is, utilize, the constitutive norms. What I call "institution" is thus not formally closed, but keeps an open structure, an "open texture"[106].

However, this "open texture" has to be filled with content, or specified in specific contexts. This comes about in each case in a different way, since the context considered is different. Here we come up against one of the motors of transformation of law, since each application of the rule, each action carried out

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[103] See K. GÜNTHER, Der Sinn für Angemessenheit, Suhrkamp, Frankfurt am Main 1988, pp. 311 ff., and cf. E. TUGENDHAT, Fragen der Ethik, Reclam, Stuttgart 1984, pp. 39 ff.

[104] G. ZAGREBELSKY, Il diritto mite. Legge, diritti, giustizia, Einaudi, Torino 1992, p. 186.

[105] G. LEOPARDI, Zibaldone, 229.

[106] Cf. C. CASTORIADIS, L'institution imaginaire de la société, Seuil, Paris 1975, p. 298.

within the framework of the institution, alters (sometimes only minimally) the institution itself.

Wittgenstein, in his last works, sketches out a distinction between (i) rules that we might call "subsumptive", whose sphere of application is predetermined, and (ii) rules we might call "productive", whose sphere of application is not predetermined. Better, as far as "subsumptive" rules are concerned, their meaning or semantic content is not influenced by their individual, specific applications. In the case of "productive" or "creative" rules, their meaning or semantic content depends on their individual, specific applications[107].

One of the important implications of the distinction between "subsumptive" and "creative" rules is that the former are not altered or changed by their application, while the latter are. The latter, the "creative" rules, undoubtedly include the constitutive rules of institutions. One of the motors for the

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[107] This difference between "subsumptive" and "creative" rules in the later Wittgenstein has been acutely stressed by Stephen Körner with explicit reference to legal norms. "The philosopher," writes Körner, "as seen by Wittgenstein, must above all avoid the scientific view of the relation between a general rule and its individual cases of application. For while the average scientist assumes that the meaning of his rules remains unaffected by their application to individual cases, Wittgenstein asserts that the meaning of every rule is to some extent dependent on the cases to which it is applied. Were that not so, the 'interpretation of the rule, and its outcome, would be left hanging in the air'. It seems useful in this context to distinguish between two types of rule, namely 'subsumptive rules', whose scope of application is fully determined by their application to individual cases, and 'creative rules' whose scope of application is in (at least) some cases determined in the course of application. That creative rules exist is a commonplace of legal practice and legal theory. Thus, a rule applied in the light of cases judged earlier can in turn become a leading precedent for its later interpretation, thereby revealing 'the creative element in legal proceedings'. Wittgenstein is convinced not only that there are creative rules, but that many rules (for instance mathematical ones, that are normally regarded as subsumptive are in fact creative" (St. KÖRNER, Über Sprachspiele und rechtliche Institutionen, in Ethik. Grundlagen, Probleme und Anwendungen, ed. by E. Morscher and R. Stranzinger, Hölder-Pichler-Tempsky, Vienna 1981, p. 484).

transformation of law (an institution founded on constitutive rules) is just the fact that the rules it is made up of change through their application. The applications of the rules have repercussions on their semantic content, which in turn obviously has repercussions on subsequent applications of the rules.

These transformations of law cannot be explained through the notion of "evolution", at least not through the "strong" notion of evolution loaded with a causalist, finalist Weltanschauung. Both, causalism and finalism, exclude the emergence of new realities like those of "institutions". "If," writes Castoriadis, "this succession is determined, or necessary, it is given with the law and its first term"[108]. As far as the law is concerned, there is no possibility of causally or finalistically deriving a rule from a particular situation of fact, and from this a particular application of it. Among constitutive rules, their precedents (other constitutive rules), the sphere of action they make possible and finally the factual actions carried out, there are multiple, complex relations that cannot be explained on a finalist or causalist model. Accordingly, as Hubert Rottleuthner writes, "a theory of legal development should be sensitive to breaks, discontinuities, degressions and regressions"[109].

The critique of the "evolution of law" paradigm does not mean denying the temporal dimension nor concealing the transformations in rules, institutions and law. My conclusion is not some dream of universality or eternity, nor the bogey of a natural law valid semper et ubique. Nor does my criticism of the concept of evolution as applied to human societies and to law imply a desire to return to an Aristotelian metaphysics of immutable "substances". Nor do I think that endeavours to establish causal connections deserve contempt, as far as the many transformations

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[108] C. CASTORIADIS, Op.cit., p. 236.

[109] H. ROTTLEUTHNER, Legal Evolution and the Limits of Law, in Law, Morality and Discursive Rationality, ed. by A. Aarnío and K. Tuori, Publications of the Department of Public Law, University of Helsinki, Helsinki 1989, p. 222.

of law are concerned.

The message of these notes is fairly simple, and perhaps disillusionary: one should not have any confidence in theories too loaded with metaphysical assumptions. In any case, if we need a metaphysics, and I think we do, I prefer one that will not and cannot, in Heinrich Heine's words, "stopfen die Lücken des Weltenbaus" - fill up the gaps in the structure of the world.

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